

EXPORT-IMPORT BANK OF THE UNITED STATES

12 CFR Parts 404 and 405

Comprehensive Revision of Export-Import Bank of the United States Freedom of Information Act, Privacy Act and other Information Disclosure Regulations and Implementation of Electronic Freedom of Information Act Amendments of 1996

AGENCY: Export-Import Bank of the United States.

ACTION: Final rule.

SUMMARY: This document sets forth comprehensive revisions of the Export-Import Bank's information disclosure regulations. The regulations are intended to supersede the Export-Import Bank's current Freedom of Information Act (FOIA) and Privacy Act regulations, found at 12 CFR parts 404 and 405, respectively. The Export-Import Bank (Ex-Im Bank) has implemented the following revisions in order to provide more "user-friendly" regulations that are consistent with current law, including the Electronic Freedom of Information Act Amendments of 1996. The regulations also include updated fee schedules.

DATES: Effective April 26, 1999.

FOR FURTHER INFORMATION CONTACT: Howard A. Schweitzer, Assistant General Counsel for Administration, (202) 565-3229.

SUPPLEMENTARY INFORMATION: This is a comprehensive revision of 12 CFR part 404 (Ex-Im Bank's current FOIA regulations) and 12 CFR part 405 (Ex-Im Bank's current Privacy

Act regulations). Part 404 contains Ex-Im Bank's regulations for the FOIA, found in subpart A, and the Privacy Act, found in subpart B. Part 404 does not contain any regulations concerning "appearance and testimony by Ex-Im Bank officers and employees," currently found at 12 CFR 404.8. Ex-Im Bank has removed and is reserving part 405 for publication of new regulations entitled "production and disclosure in federal or state proceedings."

The FOIA and related disclosure regulations, in addition to setting forth Ex-Im Bank's basic FOIA policy and procedure, include provisions, found in Sec. 404.7, to implement Executive Order 12600, "Predisclosure Notification Procedures for Confidential Commercial Information." The regulations also set forth a revised "schedule of fees," found in Sec. 404.8. The changes include increases in the hourly fees for clerical and professional time to \$16.00 and \$32.00, respectively, and a decrease in duplication charges, from \$.25 to \$.10 per photocopy. New provisions implementing the Electronic Freedom of Information Act Amendments of 1996 (Pub. L. 104-231) can be found in Sec. 404.3 (public reference facilities), Sec. 404.5 (time for processing), and Sec. 404.8(d) (material withheld). The regulations also establish, in Sec. 404.11 (administrative appeal), the Ex-Im Bank Assistant General Counsel for Administration as the appellate authority for administrative appeals under the FOIA. This final rule does not include certain provisions that were published at 63 FR 48452, August 4, 1998, in an amendment to the proposed rule. Due to comments received from relevant sources, Ex-Im Bank has decided to withdraw the substantive provisions of the proposed amendments.

The Privacy Act regulations set forth Ex-Im Bank's basic Privacy Act policy and procedures. The regulations also include the following provisions concerning matters not previously addressed: Sec. 404.19 (Request for accounting of record disclosures); Sec. 404.20 (Notice of

court-ordered and emergency disclosures); Sec. 404.21 (Submission of social security and passport numbers); and Sec. 404.22 (Government contracts). The regulations do not include a section published in the proposed rule concerning employee standards of conduct. Ex-Im Bank determined that existing statutes and regulations adequately provide for the protection of information covered by the Privacy Act.

Regulatory Flexibility Act

The Ex-Im Bank President and Chairman, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has certified that this regulation will not have a significant economic impact on a substantial number of small entities. Under the Freedom of Information Act, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Under the Privacy Act, agencies may recover only duplication costs. Thus, fees assessed by Ex-Im Bank under these regulations will be nominal. Also, Ex-Im Bank receives, on average, less than two hundred FOIA and Privacy Act requests per year, and only one in four of those requests is made by a small entity.

Certification

In accordance with the Regulatory Flexibility Act, I hereby certify that the Freedom of Information Act and Privacy Act regulations of the Export-Import Bank of the United States will not have a significant economic impact on a substantial number of small entities.

James A. Harmon
President & Chairman

Dated: November 20, 1997

Executive Order 12866

This regulation has been drafted and reviewed in accordance with the Executive Order. The Office of Management and Budget has determined that this rule is not a “significant regulatory action,” as defined by the Executive Order.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a “major rule,” as defined by the Small Business Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in cost or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects

12 CFR Part 404

Administrative practice and procedure, Confidential business information, Freedom of Information, Privacy.

12 CFR Part 405

Administrative practice and procedure, Privacy.

For the reasons stated in the preamble, Ex-Im Bank amends 12 CFR chapter IV as follows:

1. 12 CFR part 404 is revised to read as follows:

PART 404--INFORMATION DISCLOSURE

Subpart A--Procedures for Disclosure of Records Under the Freedom of Information Act.

Sec.

- 404.1 General provisions.
- 404.2 Definitions.
- 404.3 Public reference facilities.
- 404.4 Request requirements.
- 404.5 Time for processing.
- 404.6 Release of records under the Freedom of Information Act.
- 404.7 Confidential business information.
- 404.8 Initial determination.
- 404.9 Schedule of fees.
- 404.10 Fee waivers or reductions.
- 404.11 Administrative appeal.

Subpart B--Protection of Privacy and Access to Records Under the Privacy Act of 1974.

Sec.

- 404.12 General Provisions.
- 404.13 Definitions.
- 404.14 Requirements of request for access.
- 404.15 Initial determination.
- 404.16 Schedule of fees.
- 404.17 Appeal of denials of access.
- 404.18 Requests for correction of records.
- 404.19 Request for accounting of record disclosures.
- 404.20 Notice of court-ordered and emergency disclosures.
- 404.21 Submission of social security and passport numbers.
- 404.22 Government contracts.
- 404.23 Other rights and services.

Subpart C--[Reserved]

Subpart D--[Reserved]

Subpart E--[Reserved]

Authority: 5 U.S.C. 552 and 552a.

Section 404.7 also issued under E.O. 12600, 52 F.R. 23781, 3 CFR, 1987 Comp., p. 235.

Section 404.21 also issued under 5 U.S.C. 552a note.

Subpart A--Procedures for Disclosure of Records Under the Freedom of Information Act.

Sec. 404.1 General provisions.

(a) Purpose. This subpart establishes policy, procedures, requirements, and responsibilities for administration of the Freedom of Information Act (FOIA), 5 U.S.C. 552, at the Export-Import Bank of the United States (Ex-Im Bank).

(b) Policy. It is Ex-Im Bank's policy to honor all requests for the disclosure of its records, provided that disclosure would not adversely affect a legitimate public or private interest and would not impose an unreasonable burden on Ex-Im Bank. However, this subpart also recognizes that the soundness of many Ex-Im Bank programs depends upon the receipt of reliable commercial, technical, financial, and business information relating to applicants for Ex-Im Bank assistance and that receipt of such information depends on Ex-Im Bank's ability to hold such information in confidence. Consequently, except as provided by applicable law and this regulation, information provided to Ex-Im Bank in confidence will not be disclosed without the submitter's consent.

(c) Scope. All record requests made to Ex-Im Bank shall be processed under this subpart, except that information customarily furnished to the public in the regular course of the performance of official duties may continue to be furnished to the public without complying with this subpart. Requests made by individuals under the Privacy Act of 1974 which are processed under subpart B of this part also shall be processed under subpart A.

(d) Ex-Im Bank Internet site. Ex-Im Bank maintains an Internet site at

<http://www.exim.gov>. The site contains information on Ex-Im Bank functions, activities, programs, and transactions. Web site visitors have access to Board of Directors and Loan Committee meeting minutes, country information, and Ex-Im Bank press releases, among other information. Ex-Im Bank encourages all prospective FOIA requesters to visit the site prior to submission of a FOIA request.

(e) Delegation. Any action or determination in this subpart which is the responsibility of a specific Ex-Im Bank employee, may be delegated to a duly designated alternate.

(f) Ex-Im Bank address. The Export-Import Bank of the United States is located at 811 Vermont Avenue, NW, Washington, DC 20571.

Sec. 404.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

All other requesters-- Requesters other than commercial use requesters, educational and non-commercial scientific requesters, or representatives of the news media.

Appeal-- A written request to the Ex-Im Bank Assistant General Counsel for Administration for reversal of an adverse initial determination.

Business information-- Potentially confidential commercial or financial information that is provided to Ex-Im Bank.

Business submitter-- Any person who provides business information to Ex-Im Bank.

Commercial use request-- A request for a use or purpose that furthers the commercial, trade or profit interest of the requester.

Direct costs-- Expenditures incurred in the search, review, and duplication of records in response to a FOIA request.

Educational institution-- A preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, or an institution of professional or vocational education.

Final determination-- The written decision by the Assistant General Counsel for Administration on an appeal.

Initial determination-- The initial written determination by Ex-Im Bank regarding disclosure of requested records.

Non-commercial scientific institution-- An institution that is operated for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry and that is not operated solely for purposes of furthering a business, trade or profit interest.

Person-- An individual, partnership, corporation, association or organization other than a federal government agency.

Record-- All papers, memoranda or other documentary material, or copies thereof, regardless of physical form or characteristics, created or received by Ex-Im Bank and preserved as evidence of the activities of Ex-Im Bank. "Record" does not include publications which are available to the public through the Federal Register, sale or free distribution.

Redaction-- The process of removing non-disclosable material from a record so that the remainder may be released.

Representative of the news media-- A person actively gathering information on behalf of an entity organized and operated to publish or broadcast news to the public. Freelance journalists shall qualify as representatives of the news media when they can demonstrate that a request is

reasonably likely to lead to publication.

Request-- Any record request made to Ex-Im Bank under the FOIA.

Requester-- Any person making a request.

Review-- The process of examining a record to determine whether any portion is required to be withheld. It includes redaction, duplication, and any other preparation for release. Review does not include time spent resolving general legal and policy issues regarding the application of exemptions.

Search-- The process of identifying and collecting records pursuant to a request.

Trade secrets-- All forms and types of financial, business, scientific, technical, economic or engineering information, including, but not limited to, patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes.

Unusual circumstances-- The need to search for and collect requested records from facilities that are separate from Ex-Im Bank headquarters; the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or the need for consultation with another agency a person that has a substantial interest in the determination of the request.

Working days-- All calendar days excluding Saturdays, Sundays, and Federal Government holidays.

Sec. 404.3 Public reference facilities.

Ex-Im Bank maintains a public reading room which contains the Ex-Im Bank records that the FOIA requires to be made available for public inspection and copying. The records available

under this section include copies of records released pursuant to the FOIA that Ex-Im Bank determines have, or are likely to, become the subject of subsequent requests for substantially the same records. Requesters shall be responsible for the cost of duplicating such material in accordance with the provisions of Sec. 404.9(e). Persons desiring to use the reading room should contact the Ex-Im Bank Freedom of Information and Privacy Office, either in writing at the address at Sec. 404.1(f) or by telephone at (202) 565-3946 or (800) 565-3946, to arrange a time to inspect the available records.

Sec. 404.4 Request requirements.

(a) Form. Requests must be made in writing and must be signed by, or on behalf of, the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in Sec. 404.1(f) and should contain both the return address and telephone number of the requester.

(b) Description of records requested. Each request must describe the records sought in sufficient detail so as to enable a professional employee of Ex-Im Bank familiar with the subject matter of the request to locate the record with a reasonable amount of effort. A request shall not be deemed to have been received until such time as the request adequately identifies the records sought. To the extent practicable, a description should include relevant dates, format, subject matter, and the name of any person to whom the record is known to relate. A general request for records with no accompanying date restriction, either express or implied, shall be deemed to be a request for records created within the preceding twelve months.

(c) Fee statement. The request must contain a statement expressing willingness to pay fees for the requested records or a request for a fee waiver (see Sec. 404.10) before the request

shall be deemed to have been received. A fee statement may specify the maximum amount a requester is willing to pay for processing the request.

(1) Whenever a requester submits a FOIA request that does not contain a fee statement or a request for a fee waiver, Ex-Im Bank shall advise the requester of the requirements of this paragraph. If the requester fails to respond within ten working days of such notification, then the Freedom of Information and Privacy Office shall notify the requester, in writing, that Ex-Im Bank will not process the request.

(2) A general statement by the requester expressing willingness to pay all applicable fees under Sec. 404.9 shall be deemed an agreement to pay up to \$50.00. If Ex-Im Bank estimates that the fees for a request will exceed \$50.00, then Ex-Im Bank shall offer the requester the opportunity to agree, in writing, either to pay a greater fee or to modify the request as a means of limiting the cost.

(d) Written notice of amendment. The requester should provide any amendment to the original request in writing to Ex-Im Bank.

(e) Requester assistance. Ex-Im Bank shall make reasonable efforts to assist a requester in complying with the requirements of this section.

Sec. 404.5 Time for processing.

(a) General. Ex-Im Bank shall respond to requests within twenty working days of the date of receipt of the request unless unusual circumstances exist. Ex-Im Bank shall provide written notice to the requester whenever such unusual circumstances necessitate an extension. If the extension is expected to exceed ten working days, then Ex-Im Bank shall offer the requester the opportunity to:

- (1) Alter the request so that it may be processed within the time limit; or
- (2) Propose an alternative, feasible time frame for processing the request.

(b) Date of receipt. A request shall be deemed to have been received on the date that the request is received in the Freedom of Information and Privacy Office, provided that the requester has met all the requirements of Sec. 404.4. Ex-Im Bank shall notify the requester of the date on which a request was officially received.

(c) Order of processing. Ex-Im Bank ordinarily shall process requests according to their order of receipt.

(d) Expedited processing. A request for expedited processing must be included in the original request for records and may be granted at the discretion of Ex-Im Bank based upon the requester's demonstration of:

- (1) An imminent threat to the life or physical safety of an individual; or

(2) In the case of a requester who is a representative of the news media, an urgency to inform the public concerning actual or alleged Federal Government activity. Ex-Im Bank shall provide notice of its determination on expedited processing to the requester. A requester may file an administrative appeal, as set forth at Sec. 404.11, based on a denial of a request for expedited processing. Ex-Im Bank shall grant expeditious consideration to any such appeal.

Sec. 404.6 Release of records under the Freedom of Information Act.

(a) Creation of records. A reasonable request for material not in existence may be honored at Ex-Im Bank's discretion when tabulation or compilation will not significantly burden Ex-Im Bank, its programs or its activities.

- (b) Discretionary release. Consistent with federal government policy, material

technically qualifying for exemption from disclosure under 5 U.S.C. 552(b)(5) may be made available when disclosure would not adversely affect legitimate public or private interests, violate law or impose an unreasonable burden on Ex-Im Bank. This policy does not, however, create any right enforceable in a court of law.

(c) Segregable records. Whenever it is determined that a portion of a record is exempt from disclosure, any reasonably segregable portion of the record shall be provided to the requester after redaction of the exempt material. If segregation would render the document meaningless, Ex-Im Bank shall withhold the entire record.

(d) Date for determining responsive records. Only those records within Ex-Im Bank's possession and control as of the date of receipt of a request shall be deemed to be responsive to a request.

Sec. 404.7 Confidential business information.

(a) Scope. This section applies to all business information, as defined in Sec. 404.2. Such information shall only be disclosed pursuant to a FOIA request in accordance with this section.

(b) Submitter designation. All business submitters should designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of any submission that they consider to be exempt from disclosure under 5 U.S.C. 552(b)(4).

(c) Pre-disclosure notice to the business submitter. Whenever Ex-Im Bank receives a FOIA request seeking disclosure of business information, Ex-Im Bank shall provide prompt written notice to the submitter of such information. This notice shall include a description or a copy of the records containing the business information. Such notice shall not be required,

however, if:

- (1) Ex-Im Bank determines that the records shall not be disclosed;
- (2) The records have been published or otherwise made available to the public; or
- (3) Disclosure of the records is required by law.

(d) Opportunity to object to disclosure. The business submitter shall have ten working days from and including the date of the notification letter to provide Ex-Im Bank with a detailed statement of any objection to disclosure of the records. A submitter located outside the United States shall have twenty working days to object to disclosure. Ex-Im Bank may extend the time for objection upon timely request from the submitter and for good cause shown. A statement of objection must specify all grounds under the FOIA for withholding the information.

(e) Notice to the requester. The Freedom of Information and Privacy Office shall notify the requester in writing whenever a business submitter is afforded the opportunity to object to disclosure of records pursuant to paragraph (c) of this section.

(f) Disclosure of confidential business information. Ex-Im Bank shall consider any objections raised by the business submitter prior to making its disclosure decision.

(g) Notice of intent to disclose. Whenever Ex-Im Bank determines to disclose business information over the objection of a business submitter, Ex-Im Bank shall notify the business submitter, in writing, of such determination, the reasons for the decision, and the expected disclosure date. This notification -- which shall be provided at least ten days prior to the planned disclosure date and which shall include a copy or description of the records at issue -- is intended to afford the submitter the opportunity to seek judicial review.

(h) Notice to requester of disclosure date. If Ex-Im Bank determines to disclose records

over a business submitter's objection, then Ex-Im Bank shall notify the requester of the expected disclosure date.

(i) Appeal. Whenever Ex-Im Bank determines to disclose, pursuant to an administrative appeal, business information that initially was withheld from disclosure under 5 U.S.C.

552(b)(4), Ex-Im Bank shall notify the business submitter. Such notice shall be in writing and shall be provided ten working days prior to the proposed disclosure date. It shall include a copy or description of the records at issue and a statement of Ex-Im Bank's reasons for disclosure.

(j) Notice of FOIA lawsuit. Ex-Im Bank shall promptly notify the submitter whenever a requester brings suit against Ex-Im Bank seeking to compel the release of business information covered by this section. Ex-Im Bank shall promptly notify the requester when a submitter brings suit against Ex-Im seeking to restrict the release of business information that is covered by this section.

(k) Exception. Notwithstanding the foregoing provisions of this part, Ex-Im Bank may, upon request or on its own initiative, publicly disclose the parties to transactions for which Ex-Im Bank approves support, the amount of such support, the identity of any participants involved, a general description of the related U.S. exports, and the country to which such exports are destined.

Sec. 404.8 Initial determination.

(a) Authority to grant or deny requests. The Freedom of Information and Privacy Office shall be responsible for search, review, and the initial determination.

(b) Referrals to other government agencies. A requested record in Ex-Im Bank's possession that was created or classified by another federal government agency shall be referred

to such agency for direct response to the requester. The Freedom of Information and Privacy Office shall notify the requester of any such referral, the number of documents so referred, and the name and address of each agency to which the request has been referred.

(c) Notification of Ex-Im Bank action. The Freedom of Information and Privacy Office shall notify the requester in writing of its decision to grant or deny the request.

(1) If the decision is made to grant a request, then Ex-Im Bank shall promptly disclose the requested records and shall inform the requester of any fee payable under Sec. 404.9.

(2) A denial is a determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; or a determination that what has been requested is not a record subject to the FOIA. Whenever Ex-Im Bank withholds information, such notice shall include:

(i) The name, title, and signature of the person responsible for the determination;

(ii) The statutory basis for any non-disclosure; and

(iii) A statement that any denial may be appealed under Sec. 404.11 and a brief description of the requirements of that section.

(d) Material withheld. Ex-Im Bank shall make reasonable efforts to inform the requester of the volume of material withheld pursuant to a full or partial denial and the extent of any redaction. Ex-Im Bank shall not, however, indicate the extent of any denial when doing so could harm an interest protected by an applicable exemption.

Sec. 404.9 Schedule of fees.

(a) General. Ex-Im Bank shall charge fees to recover the full allowable direct costs it incurs in processing requests. Ex-Im Bank shall attempt to conduct searches in the most efficient

manner to minimize costs for both Ex-Im Bank and the requester.

(b) Categories of requesters. Fees shall be assessed according to the status of the requester. The specific schedule of fees for each requester category (each as defined in Sec. 404.2) is prescribed as follows:

(1) Commercial use requesters. Ex-Im Bank shall charge the full costs for search, review, and duplication.

(2) Educational and non-commercial scientific institution requesters. Ex-Im Bank shall charge only for the cost of duplication in excess of 100 pages. No fee will be charged for search or review.

(3) Representatives of the news media. Ex-Im Bank shall charge only for the cost of duplication in excess of 100 pages. No fee will be charged for search or review.

(4) All other requesters. Ex-Im Bank shall charge for the cost of search, review, and duplication, except that 100 pages of duplication and two hours of professional search time shall be furnished without charge.

(c) Search and review fees. Ex-Im Bank shall charge the following fees for search and review:

(1) Clerical. Hourly rate--\$16.00

(2) Professional. Hourly rate--\$32.00

(3) Computer Searches. Hourly rate--based upon the salary of the employee performing the work and the cost of operating any equipment.

(d) Administrative appeals. Ex-Im Bank shall not charge for administrative review of an exemption applied in an initial determination. Ex-Im Bank shall charge, however, for search and

review pursuant to an administrative appeal if the appeal is based on a claim other than the application of an exemption in the initial determination.

(e) Duplication. Ex-Im Bank shall charge \$.10 per page for paper copy duplication. Ex-Im Bank shall charge the actual or estimated cost of copies prepared by computer, such as tape or printouts, or for other methods of duplication. When duplication charges are expected to exceed \$50.00, Ex-Im Bank shall seek the requester's consent to be responsible for the estimated charges unless a requester has already expressed a willingness to pay duplication fees in excess of \$50.00. Ex-Im Bank shall also offer the requester the opportunity to alter the request in order to reduce duplication costs.

(f) Fees for searches that produce no records. Fees shall be payable as provided in this section even though searches and review do not generate any disclosable records.

(g) Aggregating requests. A requester, or a group of requesters acting in concert, shall not file multiple requests, seeking portions of a record or similar or related records, in order to avoid payment of fees. Ex-Im Bank shall aggregate any such requests and charge as if the requests were a single request.

(h) Special services charges. Complying with requests for special services such as those listed in this paragraph is entirely at the discretion of Ex-Im Bank. Ex-Im Bank shall recover the full costs of providing such services to the extent that it elects to provide them.

(1) Certifications. Ex-Im Bank shall charge \$25.00 to certify the authenticity of any Ex-Im Bank record or any copy of such record.

(2) Special shipping. Ex-Im Bank may ship by special means (e.g., express mail) if the requester so desires, provided that the requester has paid or has expressly undertaken to pay all

costs of such special services. Ex-Im Bank shall not charge for ordinary packaging and mailing.

(i) Minimum fee. Ex-Im Bank shall waive a final fee of \$5.00 or less.

(j) Advance payment. Whenever Ex-Im Bank estimates that the fees are likely to exceed \$250.00, Ex-Im Bank shall notify the requester of the likely cost and shall require an advance payment of an amount up to the full estimated charges.

(k) Failure to pay fee. Ex-Im Bank shall not process a request by a requester who has failed to pay a fee for a previous request unless and until such a requester had paid the full amount owed and also has paid, in advance, the total estimated charges for the new request. The administrative time limits for the new request -- set forth in Sec. 404.5 -- shall begin to run only after Ex-Im Bank has received the payments described in this section.

Sec. 404.10 Fee waivers or reductions.

(a) General. Upon request, Ex-Im Bank shall consider a discretionary fee waiver or reduction of the fees chargeable under Sec. 404.9.

(b) Form of request for fee waiver. Ex-Im Bank shall deny a request for a waiver or reduction of fees that does not clearly address each of the following:

(1) The proposed use of the records and whether the requester will derive income or other benefit from such use;

(2) An explanation of the reasons why the public will benefit from such use; and

(3) If specialized use of the records is contemplated, a statement of the requester's qualifications that are relevant to the specialized use.

(d) Burden of proof. In all cases, the requester has the burden of presenting sufficient evidence or information to justify the fee waiver or reduction. The requester may use the

procedures set forth in Sec. 404.11 to appeal a denial of a fee waiver request.

(e) Employee requests. Fees of less than \$50.00 shall be waived in connection with any request by an employee, former employee, or applicant for employment, related to a grievance or complaint of discrimination against Ex-Im Bank.

Sec. 404.11 Administrative appeal.

(a) General. Whenever a request for records, a fee waiver or expedited processing has been denied, the requester may appeal the denial within thirty working days of the date of Ex-Im Bank's issuance of notice of such action. Any denial under this subpart must be appealed according to this section before a requester is eligible to seek judicial review.

(b) Form. Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address at Sec. 404.1(f). Both the envelope and the appeal letter should be clearly marked in capital letters: "FREEDOM OF INFORMATION ACT APPEAL." Failure to properly mark or address the appeal may slow its processing. The letter should include:

- (1) A copy of the denied request or a description of the records requested;
- (2) The name and title of the Ex-Im Bank employee who denied the request;
- (3) The date on which the request was denied;
- (4) The Ex-Im Bank identification number assigned to the request; and
- (5) The return address and telephone number of the appellant.

(c) Processing schedule. Appeals shall not be deemed to have been received until the Assistant General Counsel for Administration receives the appeal. Ex-Im Bank shall notify the requester of the date on which an appeal was officially received. The disposition of an appeal

shall be made in writing within twenty working days after the date of receipt of an appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days if unusual circumstances exist, provided that the Assistant General Counsel for Administration notifies the requester in writing.

(d) Ex-Im Bank decision. A final determination which affirms an adverse initial determination shall set forth the reasons for affirming the denial and shall advise the requester of the right to seek judicial review. If the initial determination is reversed on appeal, the request shall be remanded to the Freedom of Information and Privacy Office to be processed promptly in accordance with the decision on appeal, subject to Sec. 404.7(i).

Subpart B--Access to Records Under the Privacy Act of 1974

Sec. 404.12 General provisions.

(a) Purpose. This subpart establishes policies, procedures, requirements, and responsibilities for administration of the Privacy Act of 1974, 5 U.S.C. 552a, at the Export-Import Bank of the United States (Ex-Im Bank).

(b) Relationship to the Freedom of Information Act. The Privacy Act applies to records contained in a systems of records, as defined in Sec. 404.13. If an individual submits a request for access to records and cites the Privacy Act, but the records sought are not contained in a Privacy Act system of records, then the request shall be processed only under subpart A of this part, Procedures for Disclosure of Records Under the Freedom of Information Act. All requests properly processed under subpart B shall also be processed under subpart A of this part.

(c) Appellate authority. The Ex-Im Bank Assistant General Counsel for Administration is the appellate authority for all Privacy Act requests.

(d) Delegation. Any action or determination in this subpart which is the responsibility of a specific Ex-Im Bank employee may be delegated to a duly designated alternate.

(e) Ex-Im Bank address. The Export-Import Bank of the United States is located at 811 Vermont Avenue, NW, Washington, DC 20571.

Sec. 404.13 Definitions.

For purposes of this subpart, the following definitions shall apply:

Appeal-- A written request to the Ex-Im Bank Assistant General Counsel for Administration for reversal of an adverse initial determination.

Final determination-- The written decision by the Assistant General Counsel for Administration on an appeal.

Individual-- A citizen of the United States or an alien lawfully admitted for permanent residence.

Initial determination-- The initial written determination in response to a Privacy Act request.

Record-- Any item, collection or grouping of information about an individual that is maintained within a system of records and that contains the individual's name or an identifying number, symbol or other identifying particular assigned to the individual.

Redaction-- The process of removing non-disclosable material from a record so that the remainder may be released.

Request for access-- A request to view a record.

Request for accounting-- A request for a list of all disclosures of a record.

Request for correction-- A request to modify a record.

Requester-- An individual who makes a request under the Privacy Act.

Review-- The process of examining a record to determine whether any portion is required to be withheld.

Search-- The process of identifying and collecting records pursuant to a request.

System of records-- A group of any records under the control of an agency from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual.

Working days-- All calendar days excluding Saturdays, Sundays, and Federal Government holidays.

Sec. 404.14 Requirements of request for access.

(a) Form. Requests for access must be made in writing and must be signed by the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in Sec. 404.12(e) and should contain both the return address and telephone number of the requester.

(b) Description of records sought. A request for access must describe the records sought in sufficient detail so as to enable Ex-Im Bank personnel to locate the system of records containing the records with a reasonable amount of effort. To the extent practicable, such description should include the nature of the record sought, the date of the record or the period in which the record was compiled, and the name or identifying number of the system of records in which the requester believes the record is kept. A requester may include his or her Social Security number in the request in order to facilitate the identification and location of the requested records.

(c) Fee statement. The request must contain a statement expressing willingness to pay fees for processing the request or a request for a fee waiver (see Sec. 404.16(d)).

(1) Whenever a requester submits a request for access which does not contain a fee statement or a request for a fee waiver, Ex-Im Bank shall advise the requester of the requirements of this section. If the requester fails to respond within ten working days of such notification, then the Freedom of Information and Privacy Office shall notify the requester, in writing, that Ex-Im Bank will not process the request.

(2) A general statement by the requester expressing willingness to pay all applicable fees shall be deemed an agreement to pay up to \$25.00. If Ex-Im Bank estimates that the fees for a request will exceed \$25.00, then Ex-Im Bank shall notify the requester. Ex-Im Bank shall offer the requester the opportunity to agree, in writing, either to pay a greater fee or to modify the request as a means of limiting the cost.

(3) Whenever the estimated fee chargeable under this section exceeds \$25.00, Ex-Im Bank reserves the right to require a requester to make an advance payment prior to processing the request.

(4) Ex-Im Bank shall not process a request by a requester who has failed to pay a fee for a previous request unless and until such requester had paid the full amount owed and also has paid, in advance, the total estimated charges for the new request.

(d) Verification of identity. An individual who submits a request for access must verify his or her identity. The request must include the requesters full name, current address, and date and place of birth. In addition, such requester must provide a notarized statement attesting to his or her identity.

(e) Verification of guardianship. When a parent or guardian of a minor or the guardian of a person judicially determined to be incompetent submits a request for access to records which relate to the minor or incompetent, such parent or guardian must establish:

(1) His or her own identity and the identity of the subject of the record in accordance with paragraph (d) of this section; and

(2) Parentage or guardianship of the subject of the record, either by providing a copy of the subject's birth certificate showing parentage or by providing a court order establishing guardianship.

(f) Written notice of amendment. The requester must provide any amendment to the original request in writing to Ex-Im Bank.

(g) Requester assistance. Ex-Im Bank shall make reasonable efforts to assist a requester in complying with the requirements of this section.

(h) Date of receipt. Requests for access shall be deemed to have been received on the date that the request is received by the Freedom of Information and Privacy Office, provided that all the requirements of this section have been met. Ex-Im Bank shall notify the requester of the date on which it officially received a request.

Sec.404.15 Initial determination.

(a) Time for processing. The Freedom of Information and Privacy Office shall respond to valid requests for access within twenty working days of the date of receipt of the request letter. The time for response may be extended an additional ten working days for good cause, provided that the Freedom of Information and Privacy Office notifies the requester in writing.

(b) Notice regarding request for access. The Freedom of Information and Privacy Office

shall notify the requester in writing of its decision to grant or deny a request for access.

(1) If the request is granted, then the notice shall either include the requested records, in releasable form, or shall describe the manner in which access to the record will be granted. The notice also shall inform the requester of any processing fee.

(2) A denial is a determination to withhold any requested record in whole or in part or a determination that the requested record does not exist or cannot be located. If the request is denied, then the denial notice shall state:

- (i) The name, signature, and title or position of the person responsible for the denial;
- (ii) The reasons for the denial; and
- (iii) The procedure for appeal of the denial under Sec. 404.17 and a brief description of the requirements of that section.

(c) Form of record disclosure. Ex-Im Bank shall grant access to the requested records either by providing the requester with a copy of the record or, at the requester's option, by making the record available for inspection at a reasonable time and place. If Ex-Im Bank makes the record available for inspection, such inspection shall not unreasonably disrupt Ex-Im Bank operations. In addition, the requester must provide a form of official photographic identification-- such as a passport, driver's license or identification badge-- and any other form of identification bearing his or her name and address prior to inspection of the requested records. Records may be inspected by the requester in the presence of another individual, provided that the requester signs a form stating that Ex-Im Bank is authorized to disclose the record in the presence of both individuals.

Sec. 404.16 Schedule of fees.

(a) Search and review. Ex-Im Bank shall not charge for search and review.

(b) Duplication. Ex-Im Bank shall charge \$.10 per page for paper copy duplication. Ex-Im Bank shall charge the actual or estimated cost of copies prepared by computer, such as tape or printouts, or for other methods of reproduction or duplication.

(c) Minimum fee. Ex-Im Bank shall waive final fees of \$5.00 or less.

(d) Fee waivers. Ex-Im Bank may waive fees whenever it is determined to be in the public interest. Fees of less than \$50.00 shall be waived in connection with any request by an employee, former employee or applicant for employment, related to a grievance or complaint of discrimination against Ex-Im Bank.

(e) Special services charges. Complying with requests for special services such as those listed in this paragraph is entirely at the discretion of Ex-Im Bank. Ex-Im Bank shall recover the full costs of providing such services to the extent that it elects to provide them.

(1) Certifications. Ex-Im Bank shall charge \$25.00 to certify the authenticity of any Ex-Im Bank record or any copy of such record.

(2) Special shipping. Ex-Im Bank may ship by special means (e.g., express mail) if the requester so desires, provided that the requester has paid or has expressly undertaken to pay all costs of such special services. Ex-Im Bank shall not charge for ordinary packaging and mailing.

Sec. 404.17 Appeal of denials of access.

(a) Appeals to the Assistant General Counsel for Administration. Whenever Ex-Im Bank denies a request for access or for waiver or reduction of fees, the requester may appeal the denial to the Assistant General Counsel for Administration within 30 working days of the date of Ex-Im Bank's issuance of notice of such action. Appeals must be made in writing and must be signed

by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address in Sec. 404.12(e). Both the envelope and the appeal letter should be clearly marked in capital letters: "PRIVACY ACT APPEAL." Failure to properly mark or address the appeal may slow its processing. An appeal shall not be deemed to have been received by Ex-Im Bank until the Assistant General Counsel for Administration receives the appeal letter. The letter should include:

- (1) A copy of the denied request or a description of the records requested;
- (2) The name and title of the Ex-Im Bank employee who denied the request;
- (3) The date on which the request was denied; and
- (4) The Ex-Im Bank identification number assigned to the request.

(b) Final determination. The disposition of an access appeal shall be made in writing within twenty working days after the date of receipt of the appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days for good cause, provided that the requester is notified in writing. A decision affirming the denial of a request for access shall include a brief statement of the reasons for affirming the denial and shall advise the requester of the right to seek judicial review. If the initial determination is reversed, then the request shall be remanded to the Freedom of Information and Privacy Office to be processed in accordance with the decision on appeal.

Sec. 404.18 Requests for correction of records.

(a) Form. Requests for correction must be made in writing and must be signed by the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in Sec. 404.12(e) and should contain both the return address and telephone number of the

requester. The request must identify the particular record in question, state the correction sought, and set forth the justification for the correction. The requester also must verify his or her identity in accordance with the procedures set forth at Sec. 404.14(d) and (e). Both the envelope and the request for correction itself should be clearly marked in capital letters: “PRIVACY ACT CORRECTION REQUEST.”

(b) Initial determination. The Freedom of Information and Privacy Office shall respond to valid correction requests within ten working days of receipt of the request letter. If Ex-Im Bank grants the request for correction, then the Freedom of Information and Privacy Office shall advise the requester of his or her right to obtain a copy, in releasable form, of the corrected record. A denial notice shall state the reasons for the denial and shall advise the requester of the right to appeal. Ex-Im Bank shall not charge for processing requests for correction.

(c) Appeal of denial of request for correction. Whenever Ex-Im Bank denies a request for correction, the requester may appeal the denial to the Assistant General Counsel for Administration within thirty working days of Ex-Im Bank’s issuance of notice of such action. Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address set forth in Sec. 404.12(e). Both the envelope and the appeal letter should be clearly marked in capital letters: “PRIVACY ACT CORRECTION APPEAL.” Failure to properly mark or address the appeal may slow its processing. An appeal shall not be deemed to have been received by Ex-Im Bank until the Assistant General Counsel for Administration receives the appeal letter. The letter must include:

- (1) A copy of the denied request or a description of the correction sought;

- (2) The name and title of the Ex-Im Bank employee who denied the request;
- (3) The date on which the request was denied;
- (4) The Ex-Im Bank identification number assigned to the request; and
- (5) Any information said to justify the correction.

(d) Final determination on correction appeal. (1) The disposition of an appeal shall be made in writing within twenty working days after the date of receipt of an appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days for good cause, provided that the requester is notified in writing.

(2) A decision affirming the denial of a request for access shall advise the appellant of the:

- (i) Reasons for affirming the denial;
- (ii) Right to seek judicial review; and
- (iii) Right to file a statement of disagreement, as provided in paragraph (e) of this section.

(3) If the initial determination is reversed, then the request shall be remanded to the Freedom of Information and Privacy Office to be processed in accordance with the decision on appeal.

(e) Statement of disagreement. Upon denial of a correction appeal, the appellant shall have the right to file a statement of disagreement with Ex-Im Bank, setting forth his or her reasons for disagreeing with the Agency's action. The statement should be addressed to the Freedom of Information and Privacy Office at the address in Sec. 404.12(e) and must be received within thirty working days of Ex-Im Bank's issuance of the denial notice. A statement of

disagreement must not exceed one typed page per fact disputed. Statements exceeding this limit shall be returned to the requester for editing. Upon receipt of a statement of disagreement under this section, the Freedom of Information and Privacy Office shall have the statement included in the system of records in which the disputed record is maintained and shall have the disputed record marked so as to indicate that a Statement of Disagreement has been filed. Ex-Im Bank may also append to the disputed record a written statement regarding Ex-Im Bank's reasons for denying the request to correct the record.

(f) Notices of correction or disagreement. In any disclosure of a record for which Ex-Im Bank has received a statement of disagreement, Ex-Im Bank shall clearly note any portion of the record which is disputed and shall provide a copy of the statement of disagreement. Ex-Im Bank also may provide its own statement regarding the disputed record. In addition, whenever Ex-Im Bank corrects a record or receives a statement of disagreement, Ex-Im Bank shall advise any person or agency to which it previously disclosed such record of the correction or statement, provided that an accounting of such disclosure exists.

Sec. 404.19 Request for accounting of record disclosures.

(a) Required information. With respect to each system of records under Ex-Im Bank control, Ex-Im Bank shall maintain an accurate accounting of the date, nature, and purpose of each external disclosure of a record and the name and address of all persons, organizations, and agencies to which disclosure has been made. Ex-Im Bank shall retain this accounting for at least five years or the life of the record, whichever is longer.

(b) Form. An individual may obtain an accounting of all disclosures of a record, provided that such individual establishes his or her identity as the subject of such record in

accordance with the procedures set forth at Sec. 404.14(d) and (e). A request for an accounting must be made in writing and must be signed by the requester. The request should be addressed to the Freedom of Information and Privacy Office at the address in Sec.404.12(e) and should contain both the return address and telephone number of the requester. Both the envelope and the request itself should be clearly be marked in capital letters: "PRIVACY ACT ACCOUNTING REQUEST." Failure to properly mark or address the request may slow its processing. The request shall not be deemed to have been received by Ex-Im Bank until the Freedom of Information and Privacy Office receives the request. The letter must clearly identify the particular record for which the accounting is requested.

(c) Initial determination. The Freedom of Information and Privacy Office shall notify the requester whether the request will be granted or denied within ten working days of receipt of a valid request for an accounting. Ex-Im Bank shall not charge for processing such a request.

(d) Exceptions. Ex-Im Bank shall not be required to provide an accounting to an individual when the accounting relates to a disclosure made:

- (1) To an employee within the agency;
- (2) Under the FOIA; or
- (3) To a law enforcement agency for an authorized law enforcement activity in response to a written request from such agency which specified the law enforcement activity for which the disclosure was sought.

Sec. 404.20 Notice of court-ordered and emergency disclosures.

(a) Court-ordered disclosures. When a record pertaining to an individual is required to be disclosed by a court order, the Assistant General Counsel for Administration shall make

reasonable efforts to provide notice to the subject individual. Notice shall be given within a reasonable time after Ex-Im Bank's receipt of the order, except that in a case in which the order is not a matter of public record, notice shall be given only after the order becomes public. Such notice shall be mailed to the individual's last known address and shall contain a copy of the order and a description of the information disclosed.

(b) Emergency disclosures. If a record has been disclosed by Ex-Im Bank under compelling circumstances affecting the health or safety of any person, then, within ten working days, the Assistant General Counsel for Administration shall notify the subject individual of the disclosure at his or her last known address. The notice of such disclosure shall be in writing and shall state the:

- (1) Nature of the information disclosed;
- (2) Person, organization or agency to which it was disclosed;
- (3) Date of disclosure; and
- (4) Compelling circumstances justifying the disclosure.

Sec. 404.21 Submission of social security and passport numbers.

(a) Policy. Ex-Im Bank recognizes the importance of assessing, to the extent reasonably possible, the risks associated with transactions supported by Ex-Im Bank. It is often difficult to assess risks related to individuals and non-publicly trade entities. Therefore, when an individual or a non-publicly traded entity applies for participation in an Ex-Im Bank program or is proposed as a guarantor for an Ex-Im Bank transaction, Ex-Im Bank may request social security and/or U.S. passport numbers from such individual or from the principals of such entity. Ex-Im Bank shall not require submission of this information, and unwillingness or inability to provide a

social security or passport number shall not affect Ex-Im Bank's decision on an application for Ex-Im Bank assistance.

(b) Use. Ex-Im Bank shall use social security and passport numbers to assess the creditworthiness of Ex-Im Bank program participants and as a mechanism for enforcing agreements with Ex-Im Bank. Such information shall not be disclosed, except as warranted by law and regulation.

(c) Notice. Whenever Ex-Im Bank requests a social security or passport number, Ex-Im Bank shall place an appropriate Privacy Act notification on the form used to collect the information.

Sec. 404.22 Government contracts.

(a) Approval by Assistant General Counsel for Administration. Ex-Im Bank shall not contract for the operation of a system of records or for an activity that requires access to a system of records without the express, written approval of the Assistant General Counsel for Administration.

(b) Contract clauses. Any contract authorized under paragraph (a) of this section shall contain the standard contract clauses required by the Federal Acquisition Regulation (48 CFR 24.104) to ensure compliance with the requirements imposed by the Privacy Act. The division within Ex-Im Bank that is responsible for technical supervision of the contract shall be responsible for ensuring that the contractor complies with the Privacy Act contract requirements.

(c) Contractor status. Any contractor that operates an Ex-Im Bank system of records or engages in an activity that requires access to an Ex-Im Bank system of records shall be considered an Ex-Im Bank employee for purposes of this subpart. Ex-Im Bank shall supply any

such contractor with a copy of the regulations in this subpart upon entering into a contract with Ex-Im Bank.

Sec. 404.23 Other rights and services.

Nothing in this subpart shall be construed to entitle any person to any service or to the disclosure of any record to which such person is not entitled under the Privacy Act.

Subpart C-- [Reserved]

Subpart D--[Reserved]

Subpart E-- [Reserved]

PART 405--[REMOVED AND RESERVED]

2. 12 CFR part 405 is removed and reserved.

Dated: March 16, 1999.
Kenneth W. Hansen,
General Counsel.